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No. 92-2041

In The

Supreme Court of the United States

October Term, 1993

SWAROVSKI INTERNATIONAL TRADING CORPORATION, A.G., SWAROVSKI MANAGEMENT AND CONSULTING, A.G., D. SWAROVSKI & CO., SWAROVSKI AKTIENGESELLSCHAFT, and SWAROVSKI AMERICAN LIMITED,

Petitioners,

v.

EBELING & REUSS, LTD. t/a EBELING & REUSS COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 92-204

In The

Supreme Court of the United States

October Term, 1993

SWAROVSKI INTERNATIONAL TRADING CORPORATION, A.G., SWAROVSKI MANAGEMENT AND CONSULTING, A.G., D. SWAROVSKI & CO., SWAROVSKI AKTIENGESELLSCHAFT, and SWAROVSKI AMERICAN LIMITED,

Petitioners,

v.

EBELING & REUSS, LTD. t/a EBELING & REUSS COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Swarovski International Trading Corporation, A.G.; Swarovski Management and Consulting, A.G.[1]; D. Swarovski & Co.; Swarovski Aktiengesellschaft;

[1] Swarovski Management & Consulting, A.G. is the former name of Petitioner D. Swarovski & Co. Respondent brought suit against the company under both names, although judgment was entered against it solely under the name of D. Swarovski & Co.

and Swarovski America Limited (collectively "Swarovski") respectfully request that the Court grant the Petition for a Writ of Certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit entered on April 7, 1993. None of the arguments advanced by Respondent in its Brief In Opposition justifies denial of the writ here. Indeed, Respondent's Brief is based on serious misapprehensions, if not outright distortions, of the law and the facts.

STATEMENT OF THE CASE

In the statement of the case contained in its Brief in Opposition, Ebeling & Reuss ("E&R") makes a number of errors that bear on the disposition of Swarovski's Petition for Writ of Certiorari. This is evidently done out of a license E&R feels that it has as a result of prevailing in the lower courts. However, victory below does not relieve E&R of its obligation to this Court.

Hence, contrary to E&R's assertion, *see* Brief in Opposition at 4, the early 1987 letter by Lawrence Metcalfe, President of Swarovski America Limited, was sent to Swarovski America Limited's own customers, not to the customers of E&R. *See* Rec. 4038. This misstatement is significant in light of the fact that this letter was the sole act of outrageous conduct identified by counsel for E&R, at oral argument before the Third Circuit, in support of the award of $16.5 million in punitive damages in this case. *See* Resp. App. 36-39. In addition, Swarovski had not, as E&R suggests, "secretly resolved to revoke E&R's

right to use the [Swarovski] name." *See* Brief in Opposition at 5. To the contrary, what the evidence at trial showed was that although Swarovski wanted E&R to stop using the name, and openly negotiated with E&R towards that end, Swarovski nevertheless took no action to prevent E&R's use of the Swarovski name until June 1988, when it sent a termination letter to E&R. *See* Rec. 2853; 2875-76. Equally unjustified is E&R's statement that it was forced into bankruptcy by reason of actions of Swarovski (there has never been any finding on this). *See* Brief in Opposition at 3. The Swarovski Petitioners do not want to argue facts at this late stage, but nonetheless believe that it is important to allow the Court to decide this Petition on a fair presentation of the case.

REASONS FOR GRANTING THE WRIT

In its Brief in Opposition, E&R raises a number of points in connection with the questions presented for review in Swarovski's Petition for a Writ of Certiorari. As demonstrated below, these points do not adequately explain the issues raised by the Third Circuit's disposition of this matter, nor do they provide reasons for declining to grant Swarovski's Petition for a Writ of Certiorari.

A. The District Court Improperly Allocated the Entire Punitive Damage Award to the One Affirmed Claim of Fraud

In the first question presented to the Court, the Swarovski Petitioners demonstrated that the Third

Circuit's affirmance of the district court's allocation of the punitive damages award creates a conflict between the Circuits. In response, E&R argues that the Third Circuit's decision, and presumably that of the district court, represents a correct application of *state* law. *See* Brief in Opposition at 15. In support of this assertion, E&R cites to this Court's decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989), in which the Court held that the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

E&R's reliance on *Browning-Ferris* is entirely misplaced. The first question presented in Swarovski's Petition for Writ of Certiorari deals with neither the *propriety* of an award of punitive damages, nor the *factors* the jury may consider in determining their amount. To the contrary, this question relates to the proper disposition by a federal court of an already determined punitive damage award when one or more of the claims underlying that award are later determined not to state a cause of action. Such a question is necessarily one of federal law. *See Williams v. Powers*, 135 F.2d 153, 156 (6th Cir. 1943); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, Civil § 2502 (1971). Indeed, this question has been treated as one of federal procedure by the Second, Fourth and Eleventh Circuits in analogous contexts. *See Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 104 (2d Cir. 1989); *Litman v. Massachusetts Mutual Life Ins. Co.*, 739 F.2d 1549, 1562 (11th Cir. 1984); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1034 (4th Cir. 1983).

Moreover, in contrast to the position asserted by E&R, *see* Brief in Opposition at 16, the Third Circuit's affirmance in this matter is in no way in accord with this Court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983). In *Zant*, the Court examined whether the Fifth Circuit erred in vacating the death sentence imposed on respondent. The Fifth Circuit in that case had vacated the respondent's sentence because one of several statutory aggravating circumstances that the jury expressly found was later declared to be unconstitutionally vague. Significantly, the jury in *Zant* had made explicit findings on *each* of these separate aggravating circumstances, each of which was itself sufficient to support the imposition of the death sentence.

Based on these facts, this Court reversed the Fifth Circuit's judgment on the ground that the case was not governed by the "rule derived from the *Stromberg* case . . . that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of these grounds is insufficient." 462 U.S. at 881. Continuing, the Court observed that the cases to which the *Stromberg* rule had been applied "all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested." *Id.* Based on this understanding of the scope and application of the decision in *Stromberg v. California*, 283 U.S. 359 (1931), the Court in *Zant* held that *Stromberg* did not require vacation of the respondent's death sentence "because the jury did not merely return a general verdict stating that it had found at least one aggravating circumstance. The jury expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty." *Id.*

In contrast to the *Zant* case, the facts of this case fall within the clear confines of the *Stromberg* rule. Here, the jury returned a general verdict of fraud against Swarovski and gave a single award of punitive damages. This general verdict, both on liability and punitive damages, was premised on five separate and distinct acts of fraud which E&R claimed and argued to the jury. *See* Rec. 3253-56; 3337-41. However, the jury did not, as in *Zant*, make specific findings as to which of the five separate claims of fraud Plaintiff's general finding was based on; nor did it allocate the punitive damages among the fraud claims. This omission is significant because the district court's subsequent disallowance of all but one of the five claims, and the Third Circuit's affirmance of that decision, makes it impossible to determine whether the sole affirmed act of fraud is in fact the conduct which the jury sought to punish with the award of punitive damages. This impossibility goes to the heart of the *Stromberg* rule, and has been recognized by a number of federal circuit courts of appeal in virtually identical factual situations. *See Murphy Door*, 874 F.2d at 104; *Litman*, 739 F.2d at 1562; *Barnes Group*, 716 F.2d at 1034.

B. The Third Circuit's Affirmance of the $16,500,000 Punitive Damage Award Without Opinion Violates Swarovski's Procedural Due Process Rights.

In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1992), this Court made it clear that appellate courts reviewing judgments for punitive damages are constitutionally obligated to make an independent review of the punitive damage award, both as to whether the evidence

supports such an award in any amount, and if so, whether the amount awarded is greater than that reasonably necessary to punish and deter.

More recently, in *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), the Court again recognized the critical nature of appellate review to the constitutionality of an award of punitive damages. As the plurality opinion in *TXO* states, the written opinion of the West Virginia Supreme Court of Appeals "gave careful attention to the relevant precedents." 61 U.S.C.W. 4766.[2]

In this case, the critical component of appellate review is entirely lacking. Despite the staggering absolute size of the punitive damage award, the Third Circuit failed to write one word explaining why punitive damages were warranted, and why the $16,500,000 amount was not unreasonably excessive.[3] Although the absence

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[2] It bears noting that at least seven Justices in *TXO* required some sort of meaningful appellate articulation. Four Justices concluded that the West Virginia Supreme Court had sufficiently stated its reasons to constitute adequate appellate review, while the three dissenting Justices felt the lower court did not adequately articulate its reasons for affirmance.

[3] Contrary to Respondent's assertion, *see* Brief in Opposition at 21, there is no question here of Petitioners having "waited too long" to challenge the substantive excessiveness of the punitive damage award, as well as the procedure by which it was affirmed. It should be noted in this regard that the "Motion to Strike" which Respondent filed in the Third Circuit was *denied* and that Petitioners, from the time the $16.5 million verdict was returned by the jury, have argued that it was excessive and that the trial court reached the "wrong result" substantively in entering judgment for that amount. *See* Resp. App. at 30.

of a written decision does not establish conclusively the absence of appellate review, it does insulate any presumed "appellate review" from meaningful scrutiny and make it significantly easier, through silence, to affirm while avoiding defense of the indefensible. Moreover, the very process of having to give reasons for a decision can reveal a lack of justification for that decision to the deciding court.

Because the Third Circuit failed to give reasons for its decision, it is impossible to ensure that its disposition of this case comports with the standards set forth in *Haslip* and *TXO*, as well as those that govern the award of punitive damages under state law. Put simply, the Third Circuit's failure to write an opinion makes it impossible to determine whether it conducted any appellate review of the punitive damage award, and if it did, under what standard the review was conducted. The procedure employed below does not satisfy this Court's standard as it can be determined from *Haslip* and *TXO*.

Moreover, contrary to Respondent's suggestion, a requirement that an appellate court state its reasons for affirming a $16.5 million punitive damage award will not, as a matter of due process, require written opinions in all contexts, including criminal affirmances. This Court recognized in *Haslip* that additional constitutional protections, like appellate court articulation of reasons for affirmance, were necessary in punitive damage cases precisely because the sorts of constitutional safeguards and limits available in other "punitive" contexts, most particularly criminal cases, were not applicable in civil trials for punitive damages – although the consequences could be equally, if not more, crushing to the defendant. Hence,

a defendant in a private civil suit faced with punitive damages will lack the protection of a clearly established, pre-existing standard for such liability, a set range of punishments, the "beyond a reasonable doubt" standard for liability, the requirement of a unanimous jury and the limits on fines imposed by the Eighth Amendment. *See Browning-Ferris*, 492 U.S at 275-76. In a largely standard-less area of severe punishment, the necessity that an appellate court at least be required to explain its actions in upholding penalties every bit as severe as those for which the greater safeguards of criminal procedure exist, is one of the civil defendant's few protections.

CONCLUSION

For the reasons set out above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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